Garland-Sherman Masonry *and* Manuel McCaslin

International Union of Bricklayers and Allied Craftsmen, Local No. 6 *and* Manuel McCaslin.
Cases 10–CA–24740 and 10–CB–5569

October 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On January 28, 1991, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondents and International Union of Allied Craftmen, Local #6, Retirement Fund, a party in interest named in the complaint, filed a joint answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The judge found that the International Union of Allied Craftsmen, Local #6, Retirement Fund was not an agent of either Respondent. The General Counsel argues, inter alia, that agency was established because the Fund's November 22, 1989 letter to retirees impermissibly refers to the Union's geographical jurisdiction as limiting the scope of the new benefits suspension policy. This argument lacks merit. We initially observe that the official minutes of the Fund trustees' meeting held on November 8, 1989, state that ''the Trustees adopted a Plan amendment suspending the benefits of any retired participant entering into employment in the same industry, the same trade or craft and the same geographical area covered by the Plan [emphasis added] . . . .'' Thus, it appears that either the November 8 letter is in error or the geographical jurisdictions of the Fund and the Union are coextensive. The record contains no evidence to the contrary. In any event, regardless of whether the scope of the new policy is permissible under ERISA, we adopt the judge's findings that the Fund was not an agent because the record shows that the trustees acted to protect the Fund's interests pursuant to the recommendations of an independent consultant who advised it that ERISA permitted adoption of this plan amendment and who drafted the letter to the retirees. See generally *Commercial Property Services*, 304 NLRB 134 (1991).

Richard P. Prowell, Esq., for the General Counsel.
Gerald M. Feder, Esq. (Feder & Associates), of Washington, D.C., for the Company, Union, and Retirement Fund.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. The hearing in this matter was held in Chattanooga, Tennessee, on October 19, 1990. On June 11, 1990, the Regional Director for Region 10 of the National Labor Relation Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing, based on unfair labor practice charges filed by Manuel McCaslin, an individual, on May 2, 1990, in Case 10–CA–24740 alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) against Garland-Sherman Masonry (the Company), and in Case 10–CB–5569 alleging violations of Section 8(b)(1)(A), and (2) of the Act against International Union of Bricklayers and Allied Craftsmen, Local No. 6 (the Union). International Union of Allied Craftsmen, Local #6, Retirement Fund (the Retirement Fund) was named a party in interest in the complaint and is alleged to have been at all times material an agent of the Company and Union operating pursuant to directives of trustees appointed by the Company and Union.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs.

Based on the entire record, on briefs filed by counsel for the General Counsel and counsel for the Company, Union, and Retirement Fund,[1] and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated, that at times material the Company has been, and is, a Tennessee corporation with an office and place of business located in Chattanooga, Tennessee, from which it operates as a masonry contractor in the construction industry. During the calendar year preceding issuance of the complaint, which is a period representative of all times material, the Company purchased and received at its Tennessee jobsites goods valued in excess of $50,000 directly from suppliers located outside the State of Tennessee. I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties stipulated, and I find, the Union is and at all times material has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR PRACTICES

The facts set forth herein were stipulated to, admitted, or not disputed.

The Retirement Fund is a trust established by agreement entered into on December 12, 1967, by and between the Union and employers represented by the Masonry Contractors Association of Chattanooga, Tennessee (the Masonry Contractors). In each of the past 2 years, the Company has

[1] A joint brief was filed on behalf of the Company, Union, and Retirement Fund.

been a member of the Masonry Contractors and as such is bound by the above-mentioned agreement. The Retirement Fund is a multiemployer plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et. seq. (1974).

The Retirement Fund was established and is maintained in accordance with Section 302(c) of the Labor Management Relations Act of 1947 (LMRA) 29 U.S.C. § 151 et. seq. 1947. The Retirement Fund is administered by a board of trustees with employees and employers equally represented in the administration of the Retirement Fund as required by LMRA, Section 302(c)(5)(b).

On November 8, 1989, the Retirement Fund's board of trustees met at a regularly scheduled meeting. At that meeting the board of trustees on recommendation of their professional administrator[2] adopted a suspension of benefits policy.[3] As of November 8, 1989, the Retirement Fund had an unfunded actuarial liability for a portion of the accrued benefits. As of the hearing, it still had an unfunded actuarial liability. The Retirement Fund's professional administrator has no relationship to the Company or Union and has never had any such relationship.

Under the Retirement Fund's suspension of benefits policy, if a retiree returns to work for a signatory employer, i.e., an employer who is obligated by agreement to make contributions to the retirement fund for all work performed by participants in the fund, the retiree continues to receive retirement benefits and the employer continues to make contributions necessary to fund the retirement plan. If a retiree returns to work for a nonsignatory employer, no contributions are made to fund retirement benefits and the participant's benefits are suspended. Under the Retirement Fund's rules, the retiree's status as a member or nonmember of the Union is not taken into account in determining whether to suspend benefits. The Retirement Fund maintains no records of union membership. SBA Founder and Consultant Brassell testified that as contract administrator, he received information concerning whether a retiree was working for a nonsignatory employer from one of the members of the board of trustees.[4] board of trustees' member George F. Parks Jr.,[5] testified he learned of employees/retirees working for nonsignatory employers at union meetings and from other sources.

On or about November 22, 1989, the Retirement Fund issued the following letter to all fund participants, including Manuel McCaslin and Bobby G. Smith[6] to whom it had been paying nonforfeitable retirement benefits:

> November 22, 1989
> To: All Retired Participants
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> Re: Suspension of Retirement Benefits
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> Dear Retired Participant:
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> Please be advised that the Board of Trustees of the International Union of Bricklayers and Allied Craftsmen Local No. 6 and Participating Employers Retirement Fund recently met and at that time reviewed the Plan's policy regarding employment by retired participants.
>
> The purpose of this letter is to notify you of a change to the Plan we have adopted effective immediately which will affect the monthly benefit payable to you should you elect to accept employment under such circumstances. Specifically, should you accept employment as a bricklayer in the construction industry within the geographical jurisdiction of Bricklayers Local Union No. 6 for an employer *who is not signatory* to an agreement with Bricklayers Local Union No. 6 which requires contributions to the Retirement Fund, your monthly benefit will be suspended. Such suspension will occur only for those months during which you are employed for 40 or more hours.
>
> However, you should be aware that the Trustees will automatically suspend the benefits of any retired participant who is determined to be working for a non-signatory contractor unless you produce evidence in advance that you are working for fewer than 40 hours per month. If no such notice is received by the Fund office, it will be assumed that you are working 40 or more hours and your benefit will be automatically suspended.
>
> In order to insure that your benefit is not suspended when it should not be, you should notify the Fund office in writing when you accept such employment and indicate whether you expect to be working 40 or more hours per month. If you fail to notify the Fund office of such employment and it is learned that you are so employed, not only will your future benefit be suspended until you can prove that you are no longer engaged in such employment, but any overpayments will be deducted from future monthly payments which may be due you.

[2] Southern Benefit Administrators, Inc. of Nashville, Tennessee (SBA), serves as the contract administrator for the Retirement Fund. SBA Founder and Consultant Jere Brassell serves as actuarial consultant to the Retirement Fund.

[3] SBA Founder and Consultant Brassell testified that when he became consultant to the Retirement Fund in 1981 the plan maintained no ''suspension rules'' even though regulations authorizing such had issued prior to that time. Brassell testified there are approximately 10 to 11 different types of suspension of benefits rules among the 16 or so plans that he personally works with. He testified he thought it was ''odd'' that the Retirement Fund's board of trustees had never seriously considered implementing suspension of benefits rules prior to 1988. He testified the board of trustees began to question him in 1988 about such rules. As a result of the questions, Brassell ''drafted a proposed amendment for consideration by the trustees'' which was ''reviewed in various forms over a period of at least a year and finally adopted in November 1989.''

[4] Brassell testified the burden of proof as to whether a retiree is actually working for a nonsignatory employer rests with the retiree. He stated that under Federal guidelines governing multiemployer plans, the Retirement Fund ''can assume'' that information provided it by the board of trustees related to retirees working for nonsignatory employers is correct. Brassell stated the retiree has ''an immediate right of appeal'' if the retiree questions the actions taken by the Retirement Fund or if the retiree questions the accuracy of the information upon which the action was taken.

[5] Parks is a business manager for the Union.

[6] McCaslin and Smith are named in the complaint as having had their pension payments allegedly unlawfully suspended by the Retirement Fund.

> We would therefore encourage you to always let the Fund office know if you are considering such employment. The Fund office staff will be pleased to answer any questions you may have concerning the Plan's new suspension rules. You may contact the Fund office at 899–2593.
>
> Best regards,
>
> Your Board of Trustees

At certain times since November 22, 1989, retirees McCaslin and Smith returned to work and were employed in excess of 40 hours per month by one or more nonsignatory employers that were not contributing to the Retirement Fund.

On or about February 1 and August 1, 1990, the Retirement Fund suspended pension payments to McCaslin and Smith, respectively, pursuant to the suspension rules outlined by the board of trustees in the above-set forth November 22, 1989 letter.

The Retirement Fund has continued to enforce the terms and policies expressed by the board of trustees in the above-set forth November 22, 1989 letter.

IV. DISCUSSION, ANALYSIS, AND CONCLUSION

The key issue to be addressed is whether the Retirement Fund is, and acted as, an agent of the Company and Union at the time it implemented and thereafter carried out its suspension of benefits policy. A resolution of this fundamental issue is necessary in that the unfair labor practice provisions of the Act only applies to employers, unions, or their agents.

Counsel for the General Counsel contends the operation of the Retirement Fund was, and is, completely controlled by its trustees. Counsel for the General Counsel further contends the trustees in turn are officials of the Company and Union involved. From these two contentions, he asserts:

> It is therefore clear that officials of Respondent Employer and Respondent Union collectively controlled the activities of the Fund, and under the common law of agency, this control establishes that the Fund acts as an agent of Respondent Employer and Respondent Union.

Counsel for the Company, Union, and Retirement Fund, on the other hand, asserts the Retirement Fund is neither an employer nor a union under the NLRA and ''under applicable legal principles and precedent involving ERISA trust funds, the Fund is not an 'agent' of the Respondent Employer or the Respondent Union.'' Counsel further contends that because the acts complained of by counsel for the General Counsel were performed by the Retirement Fund, a nonparty which is not liable under the NLRA's unfair labor practice provisions, no unfair labor practices have been committed.

There is no question but that the board of trustees through their own actions and the actions of a contract administrator control the Retirement Fund. There is likewise no question but that certain members of the board of trustees are either officials of the Company, Masonry Contractors, or the Union; however, it does not, as contended by counsel for the General Counsel, follow that this ''control'' establishes an agency relationship between the Retirement Fund and the Company and Union.[7] Looking closer at the situation, I note the general makeup of trustees of a ''Taft-Hartley Trust,''[8] to the extent outlined below, is dictated by statute. Section 302(c)(5) of the Act requires that ''employees and employers [be] equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon.'' The Retirement Fund is composed of an equal number of employer and employee representatives appointed by the employers and employees representatives. The mere fact that a trustee is appointed by one side or the other does not, in and of itself, make the trustee an agent of the party appointing him or her nor does it make the Fund itself an agent of the employers and/or the union. In *NLRB v. Amax Coal Co*., 453 U.S. 322 (1981), the Supreme Court held[9] employer appointed trustees of a jointly administered trust fund, such as the jointly administered one involved in the instant case, are not agents of the employer but fiduciaries ''whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.'' The Court made it clear ERISA's fiduciary standards ensure that any dual loyalties will be overcome. Simply stated, the Retirement Fund is not, as a matter of law, the agent of either the Company or the Union merely because the board of trustees were appointed by the Company and Union when the Retirement Fund was established. The Court, at least implicitedly, left open in its *Amax Coal Co*.—decision the question of whether pension fund trustees can ever act as union or employer agents and thus be subject to the Board's jurisdiction.[10] Counsel for the General Counsel urges the trustees can act as agents of either or both the Company and Union and in support thereof relies on the exceptions he contends the Board made to the Court's holding in *Amax Coal Co*. which exceptions were outlined in *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929, 931 (1984). In that case, the Board held:

> In determining whether fund actions can be attributed to a union, the courts have identified at least three factual situations: [Footnotes omitted.]

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[7] Counsel for the General Counsel relies on *Iron Workers Local 15*, 298 NLRB 445 fn. 2 (1990), to support his above-referenced contention. I note, however, that in that case which dealt with liability for backpay in a hiring hall situation, the Board, citing *Wolf Trap Foundation*, 287 NLRB 1040 (1988), rejected the notion of strict liability through the doctrine of respondeat superior in agency type cases holding instead that account must be taken of the ''specific circumstances of the agency relationship.'' To accept Counsel for the General Counsel's contention, one would have to apply a doctrine of strict liability which the Board and Courts have rejected. I have addressed in the body of this Decision the impact of officials of the Company, Masonry Contractors, and Union serving as trustees of the Retirement Fund.

[8] This is the popular term for a trust established in accordance with Sec. 302(c)(5) of the Act. See *Teamsters Local 449 (Universal Liquor Corp.)*, 265 NLRB 1539 fn. 4 (1982).

[9] The precise question at issue in *Amax Coal Co*. was ''whether the employer-selected trustees of a trust fund created under Sec. 302(c)(5) are 'representatives' of the employer 'for the purposes of collective bargaining or the adjustment of grievances' within the meaning of Sec. 8(b)(1)(B).''

[10] See *NLRB v. Teamsters Local 449*, 728 F.2d 80, 86–87 (2d Cir. 1984).

> 1. Where provisions of a collective-bargaining agreement remove the discretion to administer the funds solely for the benefit of the employees.
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> 2. Where the trustees' actions were in fact directed by union officials.
>
> 3. Where the trustees' acts were undertaken in their capacities as union officials rather than as trustees.

In this regard, counsel for the General Counsel makes three assertions, namely: (1) the actions taken by the trustees ''were in fact taken by officials of both Respondent Employer and Respondent Union''; (2) the actions of some of the trustees ''were undertaken in their capacity as officials of Respondent Union for otherwise the Fund would not have been aware that breaches of its [suspension of benefits] policy [had] occurred''; and (3) that by its suspension of benefits policy, the Retirement Fund sought ''to extend the Union's collective bargaining relationship to other employers in the industry within its geographic jurisdiction.''

On this aspect of the case, counsel for the Company, Union, and Retirement Fund argue that in order to establish the existence of an agency relationship between the Retirement Fund and the Company and Union, counsel for the General Counsel would have had to have but failed to demonstrate by substantial evidence that the Retirement Fund did not act independently of the Company and Union when it implemented its suspension of benefits policy.

Counsel for the General Counsel has made no showing of any contractual provisions that would remove from the Retirement Fund's board of trustees their discretion to administer the Funds solely for the benefit of the employees. Accordingly, counsel for the General Counsel has failed to factually establish the first exception to *Amax Coal Co.*, supra, as outlined in *Service Employees Local 1-J (Shor Co.)*, supra.

I shall next consider whether the action taken by the Board of Trustees with respect to the implementation of a suspension of benefits policy was undertaken at the direction of the Company or Union and/or whether any actions taken were undertaken by the Trustees in their capacity as Company or Union officials rather than as Retirement Fund trustees. In that regard, I am in agreement with counsel for the Company, Union, and Retirement Fund that the suspension of benefits policy implemented by the trustees was in compliance with ERISA requirements. First, the statute vests the Board of Trustees with ''exclusive authority and discretion to manage and control the assets of the plan.'' 29 U.S.C. § 1103(a). Secondly, ERISA requires that trustees carry out their duties ''in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this Title.'' 29 U.S.C. § 1104(a)(1)(D). The trust agreement applicable authorizes the Board of trustees to implement benefits policies including, but not limited to: the nature, amount and duration of benefits; eligibility requirements for benefits; methods of providing benefits; written plans on which benefits payments are to be made; and, the appeal procedure to be followed when benefits are denied. See Joint Exhibit 1, appendix 3, article 9, sections 9.1–9.6 (inclusive). Thus, when the Retirement Fund's board of trustees decided, on advice of their outside consultant/contract administrator, to establish a suspension of benefits policy with respect to retirees working for nonsignatory employers, they did so within the overall framework of their discretionary authority.

It also appears the board of trustees had *statutory* authority to implement a suspension of benefits policy. On this point, ERISA at 29 U.S.C. § 1053(a)(3)(B)(ii) provides:

> (B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits.
>
> . . . .
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Retirement Fund's suspension of benefits policy is just that, a ''suspension'' of benefits, not a ''forfeiture'' of benefits for retirees who return to full time work with a nonsignatory employer. The suspension only lasts as long as the retiree elects to work for a nonsignatory, noncontributing employer. As can be seen from the portion of the statute set forth above, the Retirement Fund's actions are consistent with that authorized by ERISA in that in the case of multiemployer plans benefits payments may be ''suspended'' when a retiree returns to work ''in the same industry, in the same trade or craft, and the same geographic area covered by the plan.'' Counsel for the General Counsel states he ''has no quarrel with this provision'' of ERISA but rather argues the Retirement Fund ''seeks to expand this provision'' and apply its suspensions of benefits policies *only* against those retirees who are reemployed in the industry with a nonsignatory employer. In this regard, counsel for the General Counsel asserts:

> While ERISA may permit the Fund to cease payments to employees who obtain work in the bricklaying industry, ERISA does not sanction a denial of benefits to employees based upon whether or not they are employed by employers who are signatory to an agreement with Respondent Union. Clearly, the Fund and Respondent Union (and Respondent Employer as an ancillary beneficiary to the scheme), seek to withhold payments to employees as a club forcing them to force their employer's to execute collective bargaining agreements with Respondent's Union, or, in the alternative, forcing retired employees to limit their employment and support to employer's who have an agreement with Respondent Union.[11]

Counsel for the General Counsel's contention regarding ERISA might well be valid if the Retirement Fund involved was other than a multiemployer type plan. ERISA, 29 U.S.C. § 1053(a)(3)(B)(i) provides that ''in the case of a plan other than a multiemployer plan'' a retiree's benefits may be sus-

[11] It is undisputed that retirees do not have their benefits suspended if they obtain employment within the jurisdiction of the Fund in industries not involving bricklaying or outside the geographic jurisdiction of the Union whether they are engaged in bricklaying or some other industry.

pended only when the retiree is reemployed by a contributing employer. No such restriction is placed on the trustees of a multiemployer plan to distinguish between retirees reemployment with signatory and nonsignatory employers. In agreement with counsel for the Company, Union, and Retirement Fund, I am persuaded Congress specifically considered the signatory/nonsignatory distinction in enacting suspension of benefits provisions and in doing so included such a restriction in other than multiemployer plans but did not do so in multiemployer plans leaving such to the discretion of the trustees of multiemployer funds. Simply stated, I am persuaded the Retirement Fund's suspension of benefits policy, as enacted, is permissible under ERISA.

Even though the Retirement Fund's suspension of benefits policy complied with fund documents and ERISA, such does not necessarily resolve the matter. Further examination is necessary to ascertain if the Retirement Fund acted in its own best interests or if its actions were taken to advance interests of the Union and/or Company independent of, or without regard for, the Retirement Fund. Clearly, the suspension of benefits policy enacted by the board of trustees advances the Fund's financial health and is consistent with its fiduciary duty to preserve and advance its assets in a prudent manner. See 29 U.S.C. § 1104. That the board of trustees had an obligation to advance the assets of the Retirement Fund is evidenced by, among other things, the fact the Fund is not yet fully funded. Under the Retirement Fund's suspension of benefits policy, if a retiree returned to work for a signatory employer, the Retirement Fund continued to collect contributions thus keeping the Fund financially strong. If however, a retiree returned to work for a nonsignatory employer in the industry, the Fund received no contributions for that reemployment, thus depleting fund assets without replenishment. In agreement with counsel for the Company, Union, and Retirement Fund, I am persuaded a stable or growing contribution base is essential to a multiemployer plan's capacity to meet its benefits commitments. Accordingly, I am persuaded that the board of trustees statutorily authorized actions regarding its suspension of benefits policies where undertaken in the Fund's interest to preserve assets. Simply stated, the evidence is persuasive, the board of trustees actions with regard to suspension of benefits were taken with an eye toward what was best for the Fund beneficiaries and not specifically, or solely, for the interests of the Company or the Union that appointed them. The mere fact the Union may have benefited from the suspension of benefits policy to the extent it may have encouraged retirees who returned to work to do so only for a signatory employer or to work toward having a nonsignatory employer become a signatory employer such does not establish an agency relationship between the Union and the board of trustees. Stated differently, the fact that the interest of the board of trustees on behalf of the Retirement Fund may have paralleled those of the Union does not in itself give rise to an agency relationship between them. *Operating Engineers Local 12 (Griffith Co.)*, 243 NLRB 1121, 1125 (1979), enfd. 660 F.2d 406, 411 (9th Cir. 1981), cert. denied 457 U.S. 1105 (1982).

The fact that the employment status of retirees was, in some instances, made known to the board of trustees by its own members, which members were appointed by and also served as officials of the Union, does not establish an agency relationship between the Union and the Retirement Fund. Nor does it establish that the board of trustees' actions were undertaken in their capacities as union officials. The issue is not how the Retirement Fund became aware of information on the employment status of retirees, rather, it is the use it made of that type information that is critical. The Board of Trustees utilized such job status information to protect and enhance the Fund in the interest of the beneficiaries of the Fund.

In summary, I recommend the complaint be dismissed in its entirety in that it has not been established that the Retirement Fund was, or acted as, an agent of the Company and Union. It has also not been shown that the actions of the board of trustees were undertaken in any manner such that the Retirement Fund could be deemed to be an agent of the Company and/or Union.

CONCLUSIONS OF LAW

1. Garland-Sherman Masonry is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union of Bricklayers and Allied Craftsmen, Local No. 6 is a labor organization within the meaning of Section 2(5) of the Act.

3. The International Union of Allied Craftsmen, Local #6, Retirement Fund is not an agent of the Company and Union.

4. Neither the Company nor Union has violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed in its entirety.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.